

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-221668 **DATE:** March 19, 1986

MATTER OF: Vertiflite Air Services, Inc.

DIGEST:

1. An amendment that creates a legal right for the government and imposes a different legal obligation on the contractor than was contained in the original solicitation is material; thus, rejection of a bid as nonresponsive for failure to include acknowledgment of the amendment is proper.
2. A nonresponsive bid may not be corrected pursuant to the mistake provisions of the Federal Acquisition Regulation and a late modification of a bid (acknowledging an amendment to the solicitation) may not be accepted where the bid as originally submitted is nonresponsive.
3. A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the competitive bidding system.
4. Protest against the need for a solicitation amendment is untimely and not for consideration when it is filed with GAO after bid opening.

Vertiflite Air Services, Inc. (Vertiflite), protests the rejection of its bid under invitation for bids (IFB) No. 806-07, issued by the Department of the Interior, Office of Aircraft Services, Boise, Idaho (Interior), for the procurement of flight services consisting of one helicopter without pilot, but fully maintained by the contractor for exclusive use by the National Park Service. The government furnishes the pilot and fuel. Vertiflite's low bid was rejected as nonresponsive because it failed to acknowledge amendment 1 to the IFB.

We deny the protest in part and dismiss it in part.

The initial IFB required all of the helicopter maintenance to be performed by the contractor. The amendment in question still required the contractor to be responsible for the cost of all maintenance, but changed the legal relationship between the parties by stating:

"The contractor is responsible for all maintenance, however, the Government reserves the right to purchase any parts or services and subtract the cost of same from monies due the contractor. The Government will coordinate such purchases with the contractor to the extent practicable. Prior approval will be secured from the contractor for any maintenance that will exceed \$1,000.00."

Therefore, under amendment 1, the government could purchase from a third party parts or services for maintenance, not expected to exceed \$1,000, without prior approval of the contractor, and then subtract the cost of these maintenance expenses from monies due the contractor.

Bids were opened on December 30, 1985, and, although Vertiflite submitted the lowest bid, it failed to acknowledge amendment 1 with its bid. On January 8, 1986, 9 days after bid opening, Interior received a signed copy of amendment 1 from Vertiflite with a letter dated December 27, 1985, stating that Vertiflite "inadvertently omitted" the acknowledged amendment from its bid. The letter also stated that the amendment did not affect Vertiflite's bid price. By letter dated January 10, Vertiflite was notified by Interior that Vertiflite's low bid was rejected as nonresponsive for failure to acknowledge (by bid opening) amendment 1, because amendment 1 represented a material change to the IFB requirements. On January 16, Vertiflite filed this protest with GAO.

Vertiflite argues that its failure to acknowledge amendment 1 by bid opening should be waived as a minor informality under Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405(d)(2) (1984), since, according to Vertiflite, the amendment had no effect on its bid. Interior argues that amendment 1 created a material change because it should increase bidders' prices because it could result in increased costs and financial responsibility for the selected contractor.

A bidder's failure to acknowledge a material IFB amendment by bid opening renders the bid nonresponsive and thus unacceptable since, absent such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Power Service, Inc., B-218248, Mar. 28, 1985, 85-1 C.P.D. ¶ 374. An amendment is material where it would have more than a trivial impact on the price, quantity, quality or delivery of the item or service bid upon, FAR, 48 C.F.R. § 14.405(d)(2) (1984), where it would impact on the relative standing of the bidders, Power Service, Inc., B-218248, supra, or where it imposes legal obligations on the contractor that were not contained in the original solicitation. Customer Metal Fabrication, Inc., B-221825, Feb. 24, 1986, 86-1 C.P.D. ¶ ____; Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 C.P.D. ¶ 344. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Reliable Building Maintenance, Inc., B-211598, supra; Navaho Corp., B-192620, Jan. 16, 1979, 79-1 C.P.D. ¶ 24.

Vertiflite contends that the amendment would not have affected its cost calculations and bid price because it assumed, prior to receiving the amendment, that if its aircraft needed work done when operating away from its designated base, the government pilot would order it from local sources rather than from Vertiflite. Interior argues, however, that the amendment gives the government the unilateral right to reduce the payment that would be due the contractor whenever the agency determines it necessary to obtain maintenance services from other than the contractor. Interior argues that since the government is empowered to spend up to \$1,000 without the contractor's approval each time such maintenance is needed, the price impact of the amendment is significant in relation to the \$8,400 differential between the 3-year total bid price of Vertiflite and the low responsive bidder.

We agree with Interior that the amendment is material because it may have had a significant impact on the bid prices in view of the narrow price gap between the protester and the low responsive bidder. Although Vertiflite argues that the amendment would not have affected its own bid price, it admits that it may have affected the bid prices of some of the other bidders. Under the circumstances, we believe that the amendment is material because it may have had an impact on the relative standing of the bidders. Power Service, Inc., B-218248, supra.

Moreover, notwithstanding the possible impact that the amendment may have had on bid prices or the relative standing of the bidders, the amendment is material because it gives the government the right to have maintenance performed on the contractor's aircraft at the contractor's expense, by a third party, without prior approval by the contractor, and to offset this cost from contract payments due the contractor. The amendment thus creates a different legal relationship between the parties than existed under the unrevised solicitation. The amendment creates a new legal right for the government, to repair the helicopter and offset the repair cost from contract payments to the contractor and imposes a new legal obligation on the contractor, to permit its helicopter to be repaired by a third party designated by the government, and therefore is material. See Customer Metal Fabrication, Inc., B-221825, supra; Reliable Building Maintenance, Inc., B-211598, supra.

Vertiflite contends that it should have been contacted by Interior for verification of Vertiflite's bid, pursuant to the mistake provisions of FAR, 48 C.F.R. § 14.406-1 (1984). The verification/mistake provisions of the FAR, however, apply only to bids that are responsive on their face and these provisions are not available to cure nonresponsive bids. Avantek, Inc., B-219622, Aug. 8, 1985, 85-2 C.P.D. ¶ 150. A bid that is nonresponsive may not be corrected after bid opening, since the nonresponsive bidder would receive the competitive advantage of choosing to accept or reject the contract after bids are exposed by choosing to make its bid responsive or not. Avantek, Inc., B-219622, supra. Therefore, Vertiflite's acknowledgment of amendment 1, on January 8, 1986, after bid opening, did not cure the nonresponsiveness of its bid. See Industrial Structures, Inc., 64 Comp. Gen. 768 (1985), 85-2 C.P.D. ¶ 165.

Vertiflite states that its bid represents a savings to the government of at least \$8,400. Although rejection of Vertiflite's bid may result in additional cost to the government on this procurement, we have consistently held that a nonresponsive bid may not be accepted, even though it would result in savings to the government, since such acceptance would compromise the integrity of the competitive bidding system. Industrial Structures, Inc., 64 Comp. Gen. 768, supra; 17 Comp. Gen. 554 (1938).

Finally, for the first time, in its comments on the agency report, Vertiflite questions the reason for amending the IFB. Vertiflite states that "there is little that can be done to the aircraft that doesn't exceed \$1,000 . . ."

Section 21.2(a)(1) of our Bid Protest Regulations requires that a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1985); Gunnison County Communication, Inc., B-219748, Sept. 19, 1985, 85-2 C.P.D. ¶ 310. Therefore, we will not consider Vertiflite's argument that Interior should not have amended the IFB because Vertiflite did not raise this argument prior to bid opening. Gunnison County Communication, Inc., B-219748, supra.

The protest is denied in part and dismissed in part.


Harry R. Van Cleave
General Counsel